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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT HAMPTON DEVINE II,

Plaintiff and Appellant,

v.

MICHAEL BRINK,

Defendant and Respondent.

D075075

(Super. Ct. No. CIVDS1509156)

APPEAL from a judgment of the Superior Court of San Bernardino County,  
Michael A. Sachs, Judge. Affirmed.

Law Offices of Michael Geller and Michael S. Geller for Plaintiff and Appellant.

Cottone & Moon, Edwin R. Cottone and Priscilla K. Moon for Defendant and  
Respondent.

Plaintiff Robert Hampton Devine II (sometimes, plaintiff or Rob Devine) appeals the judgment in favor of defendant Michael Brink following a bench trial. The court in its 42-page statement of decision (SOD), which impressively included a detailed appendix setting forth a timeline of events relative to the lawsuit, found Brink and not

plaintiff was the rightful titleholder to two boats and two trailers that Brink had purchased from Ginger Devine, the stepmother of plaintiff and the wife of Robert Hampton Devine (sometimes, Bob or Bob Devine), plaintiff's father. In reaching its decision, the court rejected plaintiff's claim that his father had gifted the boats and trailers to him, finding plaintiff not credible due to the myriad inconsistencies in his testimony regarding the circumstances of the transfer to him of the titles to the two boats and their trailers.

In his 14-page opening brief, of which six pages are devoted to the cover page, proof of service, and tables of contents and authorities, and which is the only brief he submitted in this appeal, plaintiff claims the judgment must be reversed because the court erred on the following three grounds: (1) admitting into evidence verified pleadings Ginger filed in this action before she died, which evidence the court in part relied on to find the vessels were the community assets of Bob and Ginger; (2) entering judgment in favor of Brink on plaintiff's first cause of action for quiet title, after granting Brink's motion for nonsuit following plaintiff's opening statement because the complaint was unverified, but nonetheless finding against plaintiff on the merits of this claim; and (3) not entering a default judgment against Ginger's estate on his second and third causes of action for trespass to chattel and conversion, respectively.

As we explain, we conclude plaintiff's failure to include a "summary of the significant facts" in his opening brief, as required under California Rules of Court, rule 8.204(a)(2)(C), forfeits on appeal any argument that the judgment is unsupported by substantial evidence. Reaching the merits, we conclude his claims of error lack merit. Affirmed.

## OVERVIEW

### *Summary of Dispute*

As noted, this case involves a dispute over the ownership of two boats and two trailers identified as follows: (1) a 1968 Rayson ski boat; (2) a 1966 Vance trailer for the ski boat; (3) a 1976 RASDC race boat (sometimes identified as the GN-47 race boat); and (4) a 1987 SPCNS trailer for the GN-47 race boat (sometimes items 1-4 will be collectively referred to as the vessels).

Plaintiff filed this lawsuit in June 2015 alleging causes of action against Ginger for quiet title, trespass to chattel, and conversion, as noted *ante*. Plaintiff alleged he was the rightful owner of the vessels, as his father Bob had gifted them to him in April 2013. Plaintiff further alleged that, after his father died in September 2014, Ginger fraudulently used old registration paperwork for the vessels and Bob's death certificate to "induce" the Department of Motor Vehicles (DMV) to issue title to the vessels in her name as Bob's sole heir. In May 2015, Ginger took possession of the vessels and sold them to Brink about a month later. Brink was unaware of the dispute between plaintiff and Ginger when he purchased the vessels for \$25,000. Plaintiff later amended his complaint to include Brink as a Doe defendant.

### *SOD*

As noted, the court issued a comprehensive SOD, which, as also noted, found plaintiff "lacked credibility" based on the myriad "inconsistencies in [his] testimony" regarding the transfer of the vessels to him by his father. Plaintiff on appeal only

challenges one finding of the court (which, as noted *ante*, he's forfeited on appeal): that Bob and Ginger acquired the vessels using their community funds.

#### Acquisition of the Vessels

Bob and Ginger were married in the 1980s. In or around 1987 and while married, they acquired the GN-47 race boat and its trailer. Bob initially raced the GN-47 boat in various competitions. Due to health concerns, plaintiff began racing the boat in about 1993. Sometime in the 2000's, Bob and Ginger purchased the ski boat and its trailer.

Despite the fact only Bob's name appeared on the title of the vessels, the court found they were community assets, in part based on the sworn statements of Ginger (discussed *post*). The court, however, also found Bob considered Ginger to be a co-owner of the vessels, noting as follows: "[E]vidence suggests that [Bob] considered both he and his wife . . . to be owners of the Vessels. For example, following victories by the GN-47 Race Boat in two competitions in 2010 and 2011, respectively, Bob Devine replaced the engraved inscriptions on the trophy plaques which had originally read 'Robbie Devine, Winner.' The engraved inscriptions on both trophy plaques were changed to finally read 'Driver Rob Devine' and 'Owner Bob & Ginger Devine.' [Citation.] Plaintiff confirmed at trial that his father had these engraved inscriptions changed. [Citation.] In addition, Ginger Devine's name had previously appeared on the side of the boats, which Plaintiff subsequently painted over."

### The Purported "Gift" of the Vessels from Bob to Plaintiff

The court in its SOD noted there was conflicting testimony regarding both *where* the title documents to the vessels were kept and *when* Bob allegedly gifted the vessels to plaintiff. Regarding the location of the title documents, plaintiff testified they "were in his father's possession all along. [Citation.] However, in her verified answer and verified cross-complaint, Ginger Devine stated that the pink slips for the Vessels were given to Plaintiff by Bob Devine in early 2013 only for safekeeping, and not to transfer ownership in any way, as Bob and Ginger Devine were expecting to move from California to Oklahoma. [Citations.] In addition, according to the testimony of Lynn Youngs (who has known Bob Devine and the Devine family since 1964), Bob Devine told Mr. Youngs that he did not have possession of the pink slips for the Vessels. [Citations.] Bob Devine told Mr. Youngs that he believed the pink slips were kept in the safe at Plaintiff's company, Fadco Metal Products [(Fadco)].

"Mr. Youngs further testified that Bob Devine told him that he did not transfer ownership of the Vessels to Plaintiff, nor did he want the Vessels to go to Plaintiff. [Citations.] Mr. Youngs also testified that Bob Devine was upset that plaintiff had taken the boats from him, and that Bob Devine had told him that he was worried because he had no control over the title to the Vessels as the papers for them were in Fadco's safe. [Citation.]"

The court noted that plaintiff initially claimed during his deposition that Bob gifted the vessels to him in January or February 2012. At trial, however, on cross-examination plaintiff changed his testimony and stated the gifts were made about a year

later, after "being shown at trial that his father had paid registration fees for the GN-47 Race Boat on August 6, 2012, and that he also renewed registration for GN-47 Race Boat's trailer around the same time."

At about the same time Bob allegedly gifted him the vessels, plaintiff testified he gave his father \$40,000. The court, however, in its SOD found plaintiff previously had stated under penalty of perjury in a September 30, 2015 declaration filed with the court that he gave his father \$20,000.<sup>1</sup> In either case, the court noted plaintiff "admitted that he has no evidence to confirm this cash payment to his father. [Citations.] Additionally, although Plaintiff had previously testified in his September 30, 2015 declaration and also in his verified responses to Defendant Brink's special interrogatories that this payment was 'in exchange for' the Vessels [citations], Plaintiff is now emphatic in claiming that the purported transfer was a *gift*, and that any money that he allegedly gave to his father was *not* in exchange for the Vessels. ('Q. And you gave that money in exchange for the boats; right? . . . . A. No, I gave that money to my father to help him provide for a future where he was going'); [citation] ('The money wasn't for the boats'), [citation] ('The boats were a gift. There was no doubt the boats were a gift').)"

This was not the only inconsistent statement made by plaintiff regarding his receipt of the vessels, as the court noted as follows: "In addition to this alleged \$40,000

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<sup>1</sup> A copy of the September 30 declaration, marked as exhibit 74, plaintiff's responses to special interrogatories, marked as exhibit 75, and Ginger's responses to special interrogatories, marked as exhibit 76, all of which were admitted at trial, were included in the record as a result of Brink's request to augment the record, which request was granted by Division Two of this court.

(or \$20,000) cash payment to his father, Plaintiff also testified that he paid off \$60,000 of his father's gambling debts. [Citation.] However, in his September 30, 2015 declaration, Plaintiff had previously claimed this amount was only \$30,000. [Citation.] Plaintiff admitted that he does not have evidence confirming payments of any of these alleged debts. Like the alleged \$40,000 (or \$20,000) cash payment to his father, Plaintiff had previously testified that the payment of his father's gambling debts was in exchange for the Vessels. [Citations.] As noted above, Plaintiff now refutes this claim in adamantly asserting that the Vessels were a *gift*.

"Lastly, along with the \$40,000 (or \$20,000) in cash and payment of \$60,000 (or \$30,000) worth of Bob Devine's gambling debts, Plaintiff also testified that he kept his father on Fadco's payroll for approximately two years even though his father did not perform any work for the company. [Citations.] Plaintiff did not proffer evidence confirming these payroll payments to Bob Devine. . . . Plaintiff too had previously claimed that these payroll payments were in exchange for the Vessels. [Citations.]"

The court in its SOD also found numerous inconsistencies in plaintiff's story as to the timeline of the "gifts," including that Bob's "purported signature on the pink slip for the Rayson Ski Boat releasing his interest therein was dated April 11, 2013," but that the transfer of the title to the trailer for that boat was dated April 16, 2013; that plaintiff "could not provide an explanation as to why the Rayson Ski Boat and its trailer were not conveyed at the same time"; and that "when confronted with . . . evidence that the pink slips had not been signed by his father at the same time as he had previously testified,

Plaintiff subsequently changed his story and claimed that he only saw his father sign the pink slips without indicating when they were allegedly signed."

The SOD detailed even "more discrepancies" regarding the timing of the transfers: "As noted above, the pink slips for the Rayson Ski Boat's trailer, the GN-47 Race Boat, and the GN-47 Race Boat's trailer were all purportedly signed by Bob Devine on April 16, 2013. The date of the purchase (identified as 'GIFT') for the two trailers was listed as April 16, 2013 on the back of the pink slips for both trailers, respectively. [Citations.] However, this is not the case for the GN-47 Race Boat, as the date of purchase (also identified as 'GIFT') on the back of that pink slip was listed as April 12, 2013, 4 days before Bob Devine signed the front of the pink slip to release his interest in the GN-47 Race Boat. [Citation.] In addition, there is another DMV form ('Statement to Record Ownership') completed by Plaintiff indicating the purchase date (again, identified as 'GIFT' on that form) for this boat as April 12, 2013. [Citation.] Again, this is *before* Bob Devine even allegedly signed the pink slip for the GN-47 on April 16, 2013. There has been no explanation given as to the discrepancy in these dates.

"Furthermore, on April 1, 2013 (again, *before* Bob Devine allegedly executed any of the pink slips), Plaintiff completed and signed two DMV forms, a 'Statement of Facts' form and a 'Permanent Trailer Identification (PTI) Certification' form, the latter of which to request a certificate of title for the GN-47 Race Boat's trailer. [Citation.] On the PTI Certification form, Plaintiff signed and certified under penalty of perjury that he was the 'Owner' of that trailer, despite the obvious fact that Bob Devine had not allegedly



executed any of the pink slips yet. [Citation.] No explanation has been given regarding this oddity.

"In addition, as noted above, Plaintiff testified that he did not register the Vessels on the same day that he received the signed pink slips from his father, but rather waited several weeks afterwards to register the Vessels at the DMV. [Citation.] However, the evidence contradicts his testimony. DMV records indicate that Plaintiff registered each of the Vessels on the same day that Bob Devine purportedly signed the pink slip for that particular Vessel.

"Specifically, registration was issued to Plaintiff for the Rayson Ski Boat on April 11, 2013, the same day that Bob Devine allegedly signed the pink slip for that boat. [Citation.] Registration was issued to Plaintiff for the Rayson Ski Boat trailer, the GN-47 Race Boat, and the GN-47 Race Boat's trailer on April 16, 2013, the same day that Bob Devine allegedly signed the pink slips for those Vessels. [Citations.]"

The court in its SOD also questioned the authenticity of the signatures on the pink slips and on a " 'Special Interest License Application' that was purportedly executed by Bob Devine on April 16, 2013 (the same day Bob Devine allegedly signed the pink slips for the GN-47 Race Boat, the GN-47 Race Boat's trailer, and the Rayson Ski Boat's Trailer)." With regard to the application, the court noted its purpose was to "release the vanity plate (which read 'GN47') for the GN-47 Race Boat's trailer, and the form further stated that the plate was to be a gift for Plaintiff. [Citation.] At trial, Plaintiff could not provide any explanation as to where this form came from or how Bob Devine's purported signature ended up there. [Citation.] This is suspicious to say the least, as Plaintiff

himself also executed a 'Special Interest License Application' that same day (August 16, 2013) to retain the 'GN47' plate for himself. [Citation.]

"Given the numerous inconsistencies in Plaintiff's testimony, the Court questions whether the 'Special Interest License Application' was actually signed by Bob Devine. The Court also questions the authenticity of the signatures on all of the pink slips for the Vessels. In making this finding, the Court notes that Plaintiff has used different signatures, including a signature that he used on his verification to Defendant Brink's special interrogatories that looks identical to Bob Devine's purported signature on the pink slips and other DMV forms. [Citations.]"

#### Ginger Obtains Title to the Vessels

Although plaintiff testified his father gave him the vessels in April 2013 "out of gratitude for all of the good things that Plaintiff had allegedly done for him (and also to continue his racing legacy through Plaintiff)," the court in its SOD found "Bob Devine left for Oklahoma without even informing Plaintiff that he left." Bob and Ginger moved in late 2013. "According to Ginger Devine's verified cross-complaint, after she and Bob Devine moved to Oklahoma, they had their attorney send a letter to Plaintiff demanding a return of the Vessels, which yielded no response." A copy of the August 14, 2013 letter to plaintiff was also attached as an exhibit to Ginger's August 20, 2015 declaration in support of her motion to dismiss, or, in the alternative, to stay, the litigation on the ground of inconvenient forum, which declaration plaintiff has not challenged on appeal.

In this declaration, made under penalty of perjury, Ginger stated that she and Bob had moved to Oklahoma in May 2013; that when they moved, they knew Rob "was in

possession of various racing parts as well as tools, shop equipment, and two boats owned by [her] and [her] husband"; that the two boats were being stored by plaintiff "at a public storage facility"; that she and Bob had intended to take the boats, racing parts and tools with them to Oklahoma, but plaintiff refused to return the property after Bob asked for them back; and that after moving to Oklahoma, Bob asked their attorney, Victoria Stapleton, to prepare a letter "demanding that the two boats and other property be returned" to them.

The August 14 letter—on "Stapleton & Stapleton" letterhead—identified in detail various tools and racing parts, and the vessels that are the subject of this lawsuit, and requested these items be returned to Bob. Specifically, the letter states these "items had originally been stored at FADCO Metal Products with the permission of the previous owner Marjorie De[v]ine and, after her death, due to [Bob's] health complications, it was agreed they could remain on the FADCO premises for safekeeping." The letter requested plaintiff contact Bob directly "to make suitable arrangements for the transport and delivery of the property to him."

Ginger in her August 20 declaration testified that plaintiff "ignored" the request to return the property to Bob, including the vessels; that because Bob was having health issues, he decided then not to "press the matter any further" as he "did not desire to litigate with his son"; that Bob died unexpectedly on September 29, 2014; that after his death, Ginger reviewed the status of various property and then discovered "that the titles to two of [Bob's] boats were in Rob Devine's name, and not in the names of [her] or [her] late husband"; and that title to the vessels issued to plaintiff in April 2013, or "about five

or six months before attorney Victoria Stapleton sent her letter demanding the return of the boats."

Ginger also testified in her August 20 declaration that on "further investigation, [she] determined that [her] husband's signature for the transfer of the titles of the two boats to Rob Devine had been forged"; that as a result, she contacted the DMV and reported that title to the vessels "had been wrongfully changed into the name of Rob Devine"; and that the DMV in response "issued corrective titles for the two boats so that the titles to the boats were in [her] name."

Ginger also testified in this declaration regarding how she and her husband came to own the vessels, stating, "Each of the two boats was purchased by my husband after he and I were married. The two boats were purchased at different times. At the time he purchased each boat, the title to the boat was put into his name. My husband bought the 'GN' race boat in about 1986, and the purchase was partially financed with a loan from First Interstate Bank. Earnings from my paycheck were regularly used to make the installment payments for the loan used to purchase the GN race boat. The other boat was bought sometime during the early 2000's, and my husband paid for the boat with cash from our joint bank account. He also used the money in our joint bank account to repair and refurbish the boat."

The DMV on April 14, 2015, issued Ginger title to the vessels. The court found Ginger originally wanted to move the vessels to Oklahoma, as she asked long-time family friend Mr. Youngs for help in transporting them there. Mr. Youngs in response recommended she enlist the help of Mario Barrios. "Mr. Barrios agreed to take the

Vessels to Oklahoma, and then later agreed to help her sell the Vessels. On April 28, 2015, Ginger Devine executed a document stating that she 'has given express permission to one Mr. Mario Barrios, to move, relocate, store and/or list "for sale" ' the Vessels."

In May 2015, Barrios contacted Upland police and, along with an officer, went to the storage facility where plaintiff kept the vessels. Barrios had in his possession the newly issued pink slips for the vessels that had been issued in Ginger's name. The officer verified the VIN numbers on the vessels matched the pink slips. Barrios then took the GN-47 boat to a business to have it appraised.

Once informed the vessels had been moved, plaintiff testified he tried to file a theft report with Upland police, but was told he could not do so because title to the vessels was in Ginger's name. Plaintiff next submitted a " 'Courtesy Stop Request' " to the DMV, claiming that the pink slips used to obtain the vessels were " 'fraudulently gained.' "

#### Ginger Sells the Vessels to Brink

In late May 2015, Ginger executed a form granting Mr. Youngs power of attorney to complete all necessary forms to transfer ownership of the vessels, which were in storage in Glendora, California. On June 29, 2015, Brink bought the vessels for \$25,000, broken down as follows: "\$20,000 was paid by Defendant Brink for the GN-47 Race Boat and its trailer, and \$5,000 was paid for the Rayson Ski Boat and its trailer. [Citations.] Prior to the transaction, Defendant Brink had never met Plaintiff, Ginger Devine, Mr. Barrios, or Mr. Youngs. [Citations.] Defendant Brink also had no

knowledge of the ownership dispute between Plaintiff and Ginger Devine or how she came to acquire title to the Vessels. [Citations.]

"When he purchased the Vessels, Defendant Brink received the pink slips, which already had Ginger Devine's signature on them, from Mr. Youngs and Mr. Barrios. [Citations.] Defendant Brink was informed that Mr. Youngs had power of attorney as executed by Ginger Devine to act on her behalf. [Citation.] Defendant Brink, who has himself sold approximately 50 vehicles or trailers with pink slips, believed the pink slips to be genuine. [Citation.] Nevertheless, to ensure that the sale was legitimate, Defendant Brink asked Mr. Barrios for Ginger Devine's phone number so that he could confirm that ... the Vessels were indeed for sale and further that she gave Mr. Barrios and Mr. Young[s] power of attorney to sell the Vessels. [Citations.] Ginger Devine confirmed all of this information to Defendant Brink. [Citations.]" Brinks put the vessels in storage, where they remained at least through the trial.

### Court's Ruling

#### 1. Quiet Title

The court found this cause of action failed for at least three (if not more) reasons: (1) the complaint was unverified in contravention of Code of Civil Procedure Section 761.020<sup>2</sup>; (2) Defendant Brink was the rightful owner as a bona fide purchaser for value, as he had no notice of the ownership dispute between Ginger and plaintiff; and (3) Bob

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<sup>2</sup> Code of Civil Procedure section 761.020 provides a complaint for quiet title "shall be verified" among other requirements.

did not gift the vessels to plaintiff and even if he had, because the vessels were the community property of Bob and Ginger, Bob could not have validly gifted the vessels without Ginger's "written consent" pursuant to Family Code section 1100, subdivision (b),<sup>3</sup> inasmuch as there was no writing showing a transmutation of the vessels from community to separate property.

## 2. Conversion

The court, citing *Fremont v. Indemnity Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 119 and California Civil Jury Instruction (CACI) 2100 (Conversion),<sup>4</sup> found plaintiff failed to establish this cause of action because plaintiff neither owned nor had the right to possession of the vessels. The court separately found this cause of action failed because the disposition of the vessels was not inconsistent with plaintiff's property rights to such, as Brink was a bona fide purchaser for value.

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<sup>3</sup> Family Code section 1100, subdivision (b) provides: "A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. This subdivision does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse."

<sup>4</sup> CACI 2100 provides: "[Name of plaintiff] claims that [name of defendant] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [name of plaintiff] must prove all of the following: [¶] 1. That [name of plaintiff] [owned/possessed/had a right to possess] [a/an] [insert item of personal property]; [¶] 2. That [name of defendant] substantially interfered with [name of plaintiff]'s property by knowingly or intentionally [insert one or more of the following:] [¶] [taking possession of the [insert item of personal property];] [or] [¶] [preventing [name of plaintiff] from having access to the [insert item of personal property];] [or] [¶] [destroying the [insert item of personal property];] [or] [¶] [refusing to return the [insert item of personal property] after [name of plaintiff] demanded its return.] [¶] 3. That [name of plaintiff] did not consent; [¶] 4. That [name of plaintiff] was harmed; and [¶] 5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm."

### 3. Trespass

Finally, citing to *Intel Corp v. Hamidi* (2003) 30 Cal.4th 1342, 1350 and CACI 2101 (Trespass to Chattels),<sup>5</sup> the court found this cause of action also failed because plaintiff did not establish that "(1) he has any property rights in the Vessels, (2) Defendant Brink intentionally interfered with his alleged property rights in the Vessels; and (3) as a result of Defendant Brink's actions, he suffered damages from the impairment of the Vessels or the loss of their use."

### 4. Dismissal of Ginger's Cross-complaint

As a result of the non-appearance of a representative of Ginger "and the lack of contact by any member of her estate with this Court or any of the attorney[s] in this matter, the Court order[ed] her cross-complaint against Robert Devine II dismissed with prejudice as well as having her answer to the complaint stricken and a default entered against Ginger Devine in the underlying complaint for failure to prosecute."

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<sup>5</sup> CACI 2101 provides: "[*Name of plaintiff*] claims that [*name of defendant*] wrongfully trespassed on [*his/her/its*] personal property. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of plaintiff*] [owned/possessed/had a right to possess] a [*insert item of personal property*]; [¶] 2. That [*name of defendant*] intentionally [*insert one or more of the following*:] [¶] [interfered with [*name of plaintiff*]'s use or possession of the [*insert item of personal property*];] [or] [¶] [damaged the [*insert item of personal property*];] [¶] 3. That [*name of plaintiff*] did not consent; [¶] 4. That [*name of plaintiff*] was harmed; and [¶] 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm."



## DISCUSSION

### A. *Plaintiff's Brief*

As noted *ante*, plaintiff's opening brief failed to include a summary of all material evidence relied on by the court, including evidence unfavorable to plaintiff. (See Cal. Rules of Court, rule 8.204(a)(2)(C).<sup>6</sup>) Plaintiff's "summary," denoted as the "Statement of the Case," is a little over two pages and in no way summarizes all the material evidence relied on by the court in making its findings against him and in favor of Brink, as we have summarized in detail *ante*. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Fallon*) [noting a party contending the evidence fails to support the trial court's decision must " 'set forth in [his or her] brief *all* the material evidence on the point and not *merely* [*his or her*] *own evidence*' "]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [noting a party's "attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent"].)

Plaintiff's failure to provide all material evidence in his opening (and only) brief forfeits on appeal any argument that the judgment is unsupported by substantial evidence. (*Fallon, supra*, 3 Cal.3d at p. 881; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290 [noting an appellant "has the duty to fairly summarize the facts

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<sup>6</sup> Rule 8.204(a)(2) of the California Rules of Court provides "An appellant's opening brief must: [¶] . . . (C) Provide a summary of the significant facts limited to matters in the record."

in the light favorable to the judgment, and correctly points out that the failure to do so results in a waiver of evidentiary claims"].)

*B. Plaintiff failed to Establish Error*

It is axiomatic that an order or judgment of the trial court is presumed correct and reversible error must be affirmatively shown by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error." (*Fundamental Investment ETC. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971 (*Gradow*).)

Here, as noted *ante*, plaintiff in his brief not only ignored most, if not all, of the evidence relied on by the court in making its findings against him, but also myriad conclusions of law also made by the court that for all intents and purposes moots the issues that he raises on appeal.

By way of example only, in his first claim plaintiff argues the court erred in admitting and considering statements made by Ginger in verified pleadings filed with the court. As was the case in the trial court when this issue first arose, plaintiff on appeal has not cited any legal authority to support his claim that Ginger's sworn statements in her verified pleadings were inadmissible because she died during the pendency of the litigation. Instead, he merely argues why the legal authority relied on by the court was allegedly inapposite, without *affirmatively* citing any authority showing error. His failure to provide such authority forfeits this claim of error on appeal. (See *Sporn v. Home*

*Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303 [finding that "[c]ontentions on appeal are waived by a party who fails to support them with reasoned argument and citations to authority"].)

Nonetheless, even assuming *arguendo* plaintiff is correct and the court (allegedly) erred by admitting into evidence Ginger's sworn statements from her verified pleadings, plaintiff's first cause of action to quiet title in any event fails because the court specifically found that Bob did *not* gift the vessels to him in April 2013 or at any other time, and that Ginger was the rightful owner of such as Bob's sole heir. Moreover, the court also separately found that Brink was a bona fide purchaser of the vessels, as he was unaware of any ownership dispute between plaintiff and Ginger when he purchased the vessels from Ginger.

Because plaintiff did not challenge any of these *other* findings and/or conclusions of law on appeal, and because it was his burden to do so to establish error (see *Gradow*, *supra*, 28 Cal.App.4th at p. 971), we conclude his appeal on this claim lacks merit.

### C. *Merits*

#### 1. First Claim of Error

We reject this claim for the following reasons. First, in our own independent review of the record, as summarized *ante*, we found other statements made by Ginger under penalty of perjury—including in her August 20, 2015 declaration in support of her motion to dismiss the action on the ground of forum nonconvenience—separately support the court's finding that the vessels were the community property of Bob and Ginger, which statements plaintiff has *not* challenged on appeal.

Second, Ginger as a witness was clearly "unavailable" within the meaning of Evidence Code section 240, subdivision (a)(3), as she died during the pendency of the litigation. Her unavailability does not, however, mean that a court cannot consider her sworn testimony: "Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him [or her] and while his [or her] recollection was clear." (Evid. Code, § 1261, subd. (a).)

Here, Ginger's statements in her verified pleadings regarding when she and her husband acquired the vessels, how they paid for the vessels, and their intention to take the vessels with them to Oklahoma, were clearly matters based on her "personal knowledge," as she and Bob had been married since the 1980's, prior to obtaining the vessels. (See Evid. Code, § 1261, subd. (a).) In addition, there is no suggestion Ginger's recollection was anything but "clear" (see *ibid.*) when she made these statements in the verified pleadings, nor does plaintiff argue as much on appeal.

Third, the record shows that during his own direct examination, plaintiff himself testified to statements made by Ginger before she died. In ruling to admit these statements, the court stated, "He's [i.e., plaintiff] been talking about Ginger in your direct, and now we are talking about it again. So we are going to let Ginger speak from the grave, so to speak."

By way of example only, the record shows plaintiff testified that Ginger was "aware" that Bob had transferred the vessels to him in April 2013, stating: "She [i.e.,

Ginger] wouldn't come to breakfast meetings that he and I were having. She didn't like me. She didn't like the way I—Bob spent time with me, I guess it was. I knew that she knew, because when I gave the money he actually made a comment that he wasn't quite sure how much he was going to—of that he was going to give to Ginger. And then at a later date, I don't remember what time Ginger—I called Ginger and—no, I called my dad. Ginger picked up the phone and she said, 'How much did you give Bob?' And he asked me not tell her so I said, 'It's none of your business.' "

We conclude the adage "What's good for the goose is good for the gander" is apropos here; plaintiff decries the fact that the court admitted and considered the sworn statements of Ginger from her verified pleadings, while at the same time offering testimony of Ginger's statements that ostensibly were a benefit to him. The court's decision to admit all such testimony and allow Ginger to "speak from the grave" on this issue was inherently fair and a proper exercise of its broad discretion. (See *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1685 [noting the exercise of a court's discretion to exclude or admit evidence under Evidence Code section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice].)

Fourth, although plaintiff argues the evidence from Ginger's verified pleadings was the "sole proposed evidence that the vessels were community property" at the time of the alleged transfer by Bob to plaintiff, as noted *ante* the record shows otherwise. Indeed, the court also relied on the evidence that Ginger's name appeared on the side of both

boats *before* plaintiff painted them over, and that Bob replaced the engraved inscriptions of two trophy plaques awarded in 2010 and 2010 to read " 'Owner Bob & Ginger Devine' " for races won by the GN-47 boat. (Italics added.)

In addition, as noted *ante* Ginger also testified in detail in her August 20 declaration in support of her motion to dismiss that the vessels were community property, even identifying the name of the lender who loaned Bob and her the money to buy the boat and how a portion of her paycheck each month went to repay that loan. Plaintiff has not challenged this testimony, which separately supports the court's finding the vessels were the community property of Bob and Ginger.

## 2. Remaining Claims of Error

Plaintiff next claims the court erred in dismissing his quiet title cause of action with prejudice because that cause of action was defective for his failure to verify it as required under Code of Civil Procedure section 761.020. We reject this claim of error because as we have noted, the court made detailed factual findings supporting its conclusion that Bob did not gift the vessels to plaintiff and that Brink was the rightful owner of the vessels. A dismissal with prejudice of this cause of action was thus entirely proper because the court resolved the claim on the merits.<sup>7</sup>

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<sup>7</sup> In light of our decision, we need not address Brink's alternate arguments that plaintiff forfeited this claim of error by failing to raise it in the trial court or in his objection to the (proposed) SOD. (See *Porterville Citizens for Responsible Hillside Develop. v. City of Porterville* (20017) 157 Cal.App.4th 885, 912 [noting the general rule that when a "trial court announces a tentative decision, a party who failed to bring any deficiencies or omissions therein to the trial court's attention forfeits the right to raise such defects or omissions on appeal"].)

Finally, plaintiff claims that judgment was improperly entered in favor of Brink on the second and third causes of action and that an entry of default should have been entered in plaintiff's favor against Ginger's estate, who failed to appear at the trial. We note from the record that plaintiff argued posttrial that both Ginger *and* Brink were "converters" of the vessels in his proposed statement of decision he filed with the court. It was thus entirely appropriate for the court to find in favor of Brink on both causes of action.<sup>8</sup>

Regarding his related argument to this claim of error—that the court should have entered default judgment in his favor against Ginger's estate, we note there is no indication in the record that plaintiff himself ever moved for entry of default. Nor would such a default have been proper, given the court's express findings—which are amply supported by the record evidence—that Bob did not gift the vessels to plaintiff; that Ginger was the rightful owner of the vessels as Bob's sole heir; and that Ginger sold the vessels to Brink, who was a bona fide purchaser for value.

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<sup>8</sup> The record shows the court rejected the argument of Brink at the outset of the bench trial that the second and third causes of action did not apply to him, noting plaintiff had incorporated by reference into these causes of action all previous allegations "as though fully set forth in full."

## DISPOSITION

The judgment is affirmed. Brink to recover his costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.